IRISH LAND LEGISLATION SINCE 1845. I.

IN the year 1843, Ireland was entirely under the sway of Daniel O'Connell and the Repeal Association, and the functions of the lawful government were practically suspended. Among the sources of discontent which had contributed to produce this situation, the relations of landlord and tenant were recognized as having played an important part. In October, the government broke by brute force the power of O'Connell; but previously to that, in the House of Commons, the prime minister, Sir Robert Peel, had prepared the way for this action by announcing his readiness to consider some of the chief complaints of the Irish people, among them the relations of landholders and tenants. A royal commission was appointed, under the presidency of the Earl of Devon, to report on the law and practice in reference to land tenure in Ireland, with suggestions of any desirable amendments in existing law. With the report of this commission, submitted in 1845, the land question assumed a distinct position in Irish politics which has grown steadily in importance to the present day.

I. *The Situation in* 1845.

The poverty and wretchedness of Ireland's agricultural population had been familiar facts from even earlier than the time of Swift's *Modest Proposal.* Since the accession of George III secret organizations for agrarian outrage and insurrection had followed one another in unbroken succession. In the view of the English governing class, still enveloped in prejudices of the seventeenth century, the misery of the Irish was due solely to their inherent shiftlessness, the frequent outrage and rebellion to their ineradicable depravity. In 1801 the care of Irish affairs fell more directly into the hands of the British through the Act of Union. From that date laws conferring extraordinary

powers for the suppression of crime had been numerous; laws for ameliorating the condition of the peasant's lot had been almost unknown. On a number of occasions, in times of exceptional and wide-spread distress, select committees had reported on special phases of the situation. The intensity of the wretchedness was emphasized by all, but the remedies suggested had been in general on other lines than that of modification in the legal relations of landlord and tenant. Encouragement to the reclamation of waste land, emigration and other means of relief from the evils of a redundant population were the measures most favorably mentioned, but even these had rarely received the sanction of law.[1]

The importance of the Devon Commission's report lies in the extraordinary thoroughness of the investigation upon which it was based, and in the attention which it paid to the legal as contrasted with the economic side of the land question. The commissioners were all landlords, and the distrust with which the Irish regarded them is perfectly expressed in the comment of O'Connell: "You might as well consult butchers about keeping Lent as consult these men about the rights of farmers."[2] Nevertheless, the Irish agitator himself could not have contributed more to his cause than did these landlords, when they made most prominent in current discussion the moral and legal rights of the tenant farmer instead of his social and economic delinquencies. As the victim of injustice in property rights he could appeal far more effectively to British sentiment than as the victim of his own incompetence in agriculture and his own shiftless neglect of the Malthusian law.

The census of 1841 showed that of the 1,472,739 families in Ireland, over 1,200,000 lived outside of towns numbering 2000 inhabitants, and of this rural population 491,809 families occupied mud cabins of but one room.[3] Sixty-six per cent of the total population were engaged chiefly in agriculture, and sixty-

[1] For a review of previous reports, see Devon Commission's Report, Parliamentary Papers for 1845, vol. xix, p. 8 *et seq.*

[2] Shaw Lefevre, Peel and O'Connell, p. 234.

[3] Parliamentary Papers, 1843, vol. xxiv, p. xiv *et seq.*

eight per cent of the rural element had no means of support other than their own manual labor. In this last class are included all so-called "farmers" on holdings of less than five acres. These figures are eloquent as to the social conditions which the Devon Commission had to confront. Its first general conclusion was that an increased and improved cultivation of the soil was the most important requisite for the improvement of the people. A tendency to such improvement seemed to the commissioners to exist among the farmer class; but the great mass of agricultural laborers were considered to have no prospects of bettering their condition. The commission in its report then took up and considered in order the chief subjects of complaint and controversy in connection with the occupation of land. A summary of its discussion will furnish the best possible basis for the later history of the question.

First, as to tenure. The commission investigated particularly, in the first place, the general character of the landlords' interest in their land, and found a source of many evils in the extent to which the nominal proprietors were hampered by family settlements and other burdens imposed upon the land by former owners. As to occupiers' tenure, the custom of the Ulster counties known as "tenant right" was considered the most striking phenomenon. According to this custom, a tenant, upon leaving his holding for whatever cause, claimed the privilege of exacting from his successor a sum of money running up to ten or fifteen years' rent. Practically the tenant sold his right of occupancy, subject only to the landlord's approval of the purchaser and of the amount paid. From this custom, the commission declared, a feeling of proprietorship had grown up in the tenants which was wholly anomalous in reference to ordinary notions of property. Much danger to "the just rights of property" was anticipated from the extension of this "tenant right," though in a modified form its results seemed beneficial. Apart from this particular custom, most of the land in Ireland was occupied under terminable leases or by tenants from year to year. Leases in general appeared to be unpopular and the majority of occupiers were essentially tenants at will. The "want of

tenure" was the most general topic of complaint to the commission in all parts of Ireland, and the commissioners were convinced that in many instances it was a fatal impediment to improvement.[1]

Second, as to improvements. It was pointed out under this head, as an important but unfamiliar fact, that in Ireland this word was employed to denote dwelling-houses, farm buildings and even the making of fences. "These necessary adjuncts of a farm, without which, in England or Scotland, no tenant would be found to rent it," [2] were in Ireland all contributed by the tenants. This fact, taken in connection with the general uncertainty of tenure, made apparently a most profound impression upon the commission.

Third, as to consolidation of farms. For twenty-five years, at least, the movement in this direction had been a conspicuous feature of agricultural history in Ireland. Its causes were partly economic, partly political. The fruits it had borne were most conspicuous in the annals of poor relief and of agrarian crime. Select committees had already recognized the "clearance" system as a most prolific source of disturbance among the Irish peasantry, but had endorsed the landlord's plea that it was only the painful remedy of a more painful disease; that sub-division and over-population of the land had extended to a point that was unendurable. Standing on the "just rights of property," the landlords had reformed the agricultural system. Standing on an assumed right to live, the evicted tenantry had organized Ribbon societies and shot the landlords. The Devon Commission considered that the recent instances of consolidation had been comparatively few, and that the landlord's motive in the matter was in general to increase the size of the holdings, with a view to better cultivation of the land. While admitting the misery entailed by clearances on thickly peopled estates, the commission could suggest no remedy other than humane procedure on the part of the landlords.

[1] For ten years past Mr. Sharman Crawford had been calling attention, both in and out of Parliament, to the connection between the uncertainty of the tenant's occupancy and his disinclination to improve his holding. [2] Report, p. 16.

Fourth, as to recovery of rent. The methods of procedure open to the owner against a defaulting tenant were practically two: distress and action for ejectment. Both were subjects of incessant complaint on the part of the tenantry. It was asserted that the legislation regulating the matter had been enacted solely in the interest of the landlords. Distress had been made a more effective instrument than it was originally, by statutes giving the landlord the right to sell the goods seized, and also the right to seize growing crops.[1] Ejectment, originally available only through expensive proceedings and in case of a lease containing a clause of re-entry, had been by successive laws made cheap and of much wider application, especially in tenancies where the rent did not exceed £50 annually.[2] The commissioners believed that neither of these remedies could be abolished without injury to "the just rights of property." Some modifications in the laws were suggested, however, notably the abolition of the right to distrain growing crops.

Fifth, as to the sale of estates. It was believed by the commission that there was a large number of people in Ireland able and willing to become landowners on a small scale, if an opportunity were given. The desirability of such an addition to the proprietorship of the island was unquestionable. But an insuperable obstacle was the fact that estates were so generally encumbered by family settlements and otherwise, that dividing and selling them piecemeal was a hopelessly difficult and expensive task.

Sixth, as to agricultural laborers. This was the most numerous and the most wretched class of the population. Lack of employment seemed to be the fundamental source of their misery. The custom of conacre — letting a small piece of land for one or two crops only — was the subject of general condemnation by all men acquainted with its effects both upon the laborers and the land. But the commissioners thought that it was almost essential to the existence of the laborer. Unable either to take a permanent holding or to live on his wages, he obtained

[1] Montgomery, Land Tenure in Ireland (Cambridge University Press, 1889), p. 99.
[2] Report of the Devon Commission, p. 23.

from some farmer by conacre the opportunity of at least raising enough potatoes to keep life in his body. But in general he paid enormously for the privilege, and the commission approved the practice adopted by some landlords of setting aside small allotments, with decent cabins, for the laborers on their estates.

Such were the more conspicuous features of the land question in Ireland in 1845. The Devon Commission was in general quite impartial in its presentation of the facts. In its recommendations it well reflected the general trend of what was then the rather progressive element of English thought. Nothing more clearly shows the character of this thought than the frequent recurrence in the report of the phrase, "the just rights of property," and the repeated refusal, after the presentation of serious evils, to recommend legislative intervention for their removal. The most important of the changes it approved in the laws affecting the occupation of land were as follows:

1. A number of measures designed to facilitate the conversion of uncertain tenancies into leaseholds or proprietorships; *e.g.* the extension of leasing powers to holders for life and to corporations, the reduction of the stamp tax on leases, and legislation to encourage the sale of incumbered estates.

2. Laws looking to the stimulation of improvements: on the landlord's side, by enabling limited owners to charge upon the estate the cost of works calculated to be of permanent value to the property; on the tenant's side, by securing to him the long-sought "compensation for improvements." In reference to this latter subject the commission displayed real earnestness; but this feeling did not lead them to lose sight of the landlord's interest. They would permit, first, the registration of an agreement between landlord and tenant as to the character and cost of the improvements to be made, this to be enforceable in the courts. Second, in case no agreement could be reached, the tenant should be enabled to serve notice of proposed improvements — such as buildings and fences — upon the landlord, and to have their suitableness and maximum cost fixed by arbitrators and the court; then, in case of ejectment or increase of rent, the tenant should be entitled to compensation within the maximum fixed.

3. The extension of the practice already in vogue, of advancing public funds by way of loan to private persons for agricultural improvements, and to public corporations for useful works.

With the efforts to carry out such moderate recommendations as these, the history of progressive land legislation begins. The time that has elapsed since 1845 may be divided into three pretty clearly marked periods: (1) 1845–1865, during which all legislation in reference to the land question proceeded from the standpoint of the landlord and was governed by the English notions of his absolute ownership; (2) 1865–1885, the years of transition, in which it was sought to give a general legal recognition to the tenants' interest in the land, while still retaining landlords' rights; (3) 1885–1891, in which all attention has been concentrated on the conversion of the tenant into a proprietor.

II. *Legislation based on the Principle of Absolute Ownership by the Landlord.*

This period opens with the demoralizing years of the great famine. Between 1845 and 1850 starvation and disease wrought the most complete social disorganization throughout Ireland. A ghastly but effective solution was reached of many problems incident to over-population. The work begun by hunger and pestilence was carried on by emigration, and landlords and government eagerly stimulated this movement, which was destined to react so unpleasantly on both in the future.

The dreadful incidents of the famine years attracted general attention to the condition of Ireland, and in the discussion of the evils and their remedies, the land question assumed great prominence. To the changes in the actual situation due to death and voluntary emigration, were added those resulting from the policy of consolidation of farms, which many landlords believed themselves justified in adopting. The "clearances" which this consolidation involved furnished an abundant crop of pathetic incidents, and stimulated in a large degree the agitation for tenant right that covered the years from 1850

to 1854. The net result of all the complications of the famine period was a wide-spread conviction that something must be done in the matter of Irish land law. In determining what line of action should be taken, the suggestions of the Devon Commission were always referred to by both Whig and Tory governments. And of these suggestions, that concerning compensation to tenants for improvements was considered the most promising subject for action.

Throughout the whole period under consideration, an almost uninterrupted series of bills dealing with land law were presented to Parliament by Irish members. These continued, at first, the long familiar demand for compensation for improvements, but after the famine the usual proposal was the recognition and extension of the Ulster tenant right. The government, however, never got beyond the idea of compensation. To realize this idea, bills were brought forward by Sir Robert Peel's ministry in 1845, by Lord Russell's in 1846 and 1848 and by Lord Derby's in 1852. The fundamental principle in each was the absolute property-right of the landlord in his estate. Lord Stanley, in introducing the bill of 1845, took pains expressly to disclaim any intention (1) to give tenants fixity of tenure against the landlord's will, (2) to interfere with the landlord's discretion about granting leases, or (3) to interfere in any way with the amount of rent the landlord might exact.[1] All that was proposed was to secure to the tenant as absolute a right to the capital he invested in improvements as the landlord had to the economic value of his land. But while the owner's power of arbitrary eviction was a standing menace to the tenant's property right in his improvements, it was promptly pointed out that the occupier's power of arbitrary improvement was in equal degree threatening to the landlord's interest in his land. Good landlords as well as bad stood aghast at the results that would ensue, if every ignorant tenant of a five-acre plot should have by law the right to work out his conception of "improving" the holding and then to charge the landlord for it. The abstract justice of compensation was not

[1] Hansard, 3d series, vol. lxxxi, p. 221.

disputed, but the determination of what should constitute an improvement was a vexatious matter.

In meeting this difficulty two methods were employed in the various government propositions: first, the enumeration and definition of works for which compensation could be claimed; second, the institution of machinery for determining the beneficial character of the enumerated works in each particular instance. The bill of 1845 enumerated but three improvements, buildings, drainage and the levelling of "fences";[1] that of 1846 was confined to the first two of these;[2] that of 1852 added the reclamation of waste land, the clearing away of rocks and the building of fences.[3] For determining the utility of proposed improvements Stanley's bill in 1845 provided a government office, headed by a commissioner of improvements, whose approval of the work done would entitle the tenant to compensation. It was this provision that killed the bill. The most violent protests came from the Lords against such interference with the rights of property.[4] It would enable an occupier and a government official to make alterations in a landlord's estate without the owner's consent, and then, in addition, make him pay for the injury. This was sheer confiscation. Lord Stanley protested that the object was merely to get a cheap and impartial tribunal to fix the compensation, and asked if the landlords would be better satisfied to leave their case to a local jury.[5] But though the bill passed its second reading in the Lords, it was sent to a select committee, whence it never came forth.[6] The Earl of Lincoln's bill (1846) provided first for a voluntary agreement between tenant and owner, securing compensation or increased rent according as the improvement was effected by the one or the other; and second for "compulsory agreement,"

[1] These were the great earth banks characteristic of some parts of Ireland even at the present day. Stanley estimated that they occupied generally about twenty per cent of the land in each farm, and did not prevent the ingress or egress of any living being. Hansard, vol. lxxxi, p. 223.

[2] British Parliamentary Papers, 1846, vol. ii, Landlord and Tenant (Ireland).

[3] *Ibid.* 1852–53, vol. viii, Tenants' Improvements Compensation (Ireland).

[4] See protest of thirty-six peers owning land in Ireland. Hansard, vol. lxxxi, p. 1119.

[5] Hansard, vol. lxxxi, p. 1142 *et seq.*

[6] *Ibid.* vol. lxxxii, p. 493.

under which, at the tenant's instance, the suitableness of proposed alterations should be decided by arbitration. Here the court was brought in to appoint an arbitrator to represent the landlord, if the latter refused to name one. Sir William Somerville's proposition (1848), as originally submitted, contained the arbitration scheme, to which a select committee added Stanley's government commissioner as a resource in case the arbitrators failed to agree.

It was evident after the discussion of these bills that the vaunted principle of compensation for improvements was not so easy of application as had been supposed. The originators of the idea had intended simply to assure to the tenant the power to cultivate his holding in the most effective way without suffering ultimate loss. With the complicated machinery which tenderness for the landlord's rights made inevitable, the friends of the tenant felt that all stimulus to improvement was lost. Their attention was diverted to projects for legalizing and extending the Ulster custom which had figured so extensively in the Devon Commission's report, while the landlord interest turned to a consideration of measures to facilitate improvement by the owners themselves. By 1852, the tenant-right agitation had attained such headway that Lord Derby's government undertook to check it by a wide scheme of land-law reform. One feature of this scheme was Napier's compensation for improvements bill. In this, however, the vital question of landlord's rights found no new solution; Stanley's government commissioner was again the ultimate authority as to the suitableness of the improvement, and the same elaborate processes of notification and inspection and registration were inserted to paralyze the progressive cultivator. There were some new provisions more favorable to the tenant, in particular one that brought past as well as future improvements within the scope of compensation. That was in the landlords' eyes confiscation absolute,[1] but some concession had to be made to the threatening spectre of tenant right. Lord Derby's government

[1] Mr. Napier complained bitterly in the House that he had been charged with communistic principles. Hansard, vol. cxxiii, p. 1544.

fell, however, before the measure could obtain complete legislative action, and under the new administration the compensation bill was thrown out by a Lords' committee.[1] Not till 1860 was the idea of compensation for tenants' improvements again taken up by the government. In that year, in the midst of an act offering incentives to owners to improve, provisions were inserted which affected the tenants also.[2] For certain enumerated works, undertaken with the consent of the landlord, agricultural occupiers were given an annuity of $7\frac{1}{10}$ per cent on their outlay, to be collectible, however, only in case of eviction, and then to run for the unexpired part of a term of twenty-five years from the date of the expenditure. Such was the result of twenty-five years of struggle for tenants' compensation. The landlord's conception of his interest in the soil remained intact. His consent must be obtained for any alteration on his estate, his power of arbitrary eviction remained unaffected, his liability to the tenant ceased with a fixed term, and all past improvements were left absolutely his. Against each of these principles the friends of the tenants' cause had for years been committed to uncompromising hostility. Mr. Cardwell, who had charge of the bill, defended it only on the ground that any more sweeping reform was hopeless of success.[3]

But while this rather inadequate result had been reached in providing a stimulus to the tenants to improve, the recommendations of the Devon Commission in reference to facilitating improvements by the landlords had been more fruitful. The report had dwelt especially upon the importance, first, of enabling limited proprietors to charge permanent improvements upon the estate; and second, of providing some practicable means by which owners whose estates were hopelessly burdened by incumbrances might dispose of their land to purchasers who could with a clear title devote capital to improvements. A bill designed to carry out the latter suggestion was passed with little opposition in 1848,

[1] Hansard, vol. cxxxiii, p. 516. The Lords passed a Landlord and Tenant Bill containing a clause granting compensation for buildings, but it was dropped by the government in the House of Commons. Hansard, vol. cxxxv, p. 196.

[2] 23 and 24 Vict. c. 153. [3] Hansard, vol. clvii, p. 1553 *et seq.*

and is known as the Incumbered Estates Act.[1] A cheap and simple process was provided by which, under the oversight of the Court of Chancery, a burdened estate could be sold and the money apportioned among those having interests in it. To the purchaser was given a Parliamentary title.[2] It was expected that by this act a large body of new landlords would be introduced into Ireland, and that these, being provided with sufficient capital and sufficient progressiveness, would make a decided change in the general agricultural situation. The first of these expectations was fulfilled;[3] as to the second, there has been much controversy.

But by far the most ambitious attempt to settle the land question from the standpoint of the landlord was that expressed in the two acts of 1860. The first of these, commonly known as Cardwell's Act,[4] dealt with the whole question of improvements under three heads — landlords' improvements, leasing powers and tenants' improvements. The last of these I have just described. The first part carried out the recommendation of the Devon Commission in reference to limited owners. Under the sanction of the Landed Estates Court, such owners were authorized to make specified improvements and to become entitled by such action to an annuity of $7\frac{1}{10}$ per cent for twenty-five years, chargeable upon the estate. An elaborate machinery of notification, registration and official sanction was provided to protect the interests of the successor. The part of the act relating to leasing powers was also devised in accordance with a recommendation of the Devon Commission. Encouragement to leases had long been a favorite proposition with those who wished to remedy the evils of the yearly tenancies which were characteristic of Ireland. By Cardwell's Act various limited owners, including public and private corporations, were authorized to grant leases, to be distinguished as agricultural, improvement and building leases. The improvement lease bound

[1] 11 and 12 Vict. c. 48.

[2] For a statement of the objects and provisions of the bill, see Hansard, vol. c, p. 94.

[3] By April 1, 1853, 2811 conveyances had been executed under this act, involving an investment of £8,790,917. British Parliamentary Papers, 1852–53, vol. xciv.

[4] 23 and 24 Vict. c. 153.

the lessor to effect specified agricultural improvements in his occupancy, and the building lease required the erection of certain structures. Here, as in the other parts of the bill, the supervision of the courts was made very complete, in order to protect the interests of the estate.

The other law of 1860 dealing with the land question was that known as Deasy's Act.[1] The Devon Commission and many persons since its time had pointed out the great confusion that existed in the whole subject of land law in Ireland. A consolidation act had been one of the features of Lord Derby's scheme in 1852. Since the great transformation wrought by the famine, and especially under the successful workings of the Incumbered Estates Act, it had become a common idea that a simplification of legal relations was all that was needed to make Ireland happy. Brush away, it was said, all the relics of feudal conceptions that complicate the status of both landlord and tenant, and let everything stand on the simple basis of definite agreement between the owner and the cultivator of the soil.[2] The new proprietors who had become possessed of 2,000,000 acres of Irish land were chiefly Irish capitalists,[3] who were animated by the purpose to make the most out of their investments. Their business instincts, if allowed full play by law, would do more for the agricultural development of Ireland than would ever be possible under the restrictions of the existing system. In accordance with this line of reasoning, Deasy's Act was based on the explicit declaration that

> The relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service, and a reversion shall not be necessary to such a relation, which shall be deemed to exist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of rent.[4]

It was in the spirit of this clause that the whole code was

[1] An Act to Consolidate and Amend the Law of Landlord and Tenant in Ireland. 23 and 24 Vict. c. 154. Sometimes also known as Cardwell's Act.

[2] This reasoning appears frequently in the debates on Napier's bills in 1852–54. *Cf.* Hansard, vol. cxxxi, p. 7, 18 *et passim*.

[3] Hansard, vol. clvii, p. 1556.

[4] 23 and 24 Vict. c. 154, sec. 3.

drawn up and the existing law amended. At the instance of Irish members some clauses were inserted giving the tenant the right to remove agricultural fixtures at the end of his tenancy,[1] and certain limitations were put upon the remedy of distress against the tenant for rent. In general, however, amendments to existing law were favorable to the absolute right of property in land,[2] and to the most perfect facilities for its transfer.

For some five years after the legislation of 1860, little was heard of the land question — far too little, indeed, to betoken the success of the acts. By 1865, their failure to effect any real improvement in agricultural conditions became pronounced. Irish agitation was making itself manifest in the widespread activity of the Fenians, and the self-introspection to which conscientious Britons devote themselves at the periodical revivals of discontent in the sister island revealed the hopeless insufficiency of their ideas as to land legislation. The landlords'-improvements sections of Cardwell's Act had been invoked in but two cases in three years;[3] the provisions for tenants' improvements, in but one case. The carefully arranged stimulus to leases had produced, so far as statistics were available, nine leases. As to Deasy's Act, it was reported that the net result had been, by the simplification of procedure, to make ejectment more common, and so to contribute much to the greatest of all evils — insecurity of tenure. The new landlords with business instincts, from whom so much had been expected, had displayed these instincts in a way most disastrous to the interests of the tenants. Business instincts are only satisfied with large returns for investments, and the search for such returns had resulted in ejectments without mercy and in wholesale confiscation of tenants' improvements. As was stated before a select committee, the new landlords "were men who had not the old traditions of negligence and indulgence combined."[4]

[1] Hansard, vol. clx, p. 271.

[2] For a good discussion of this act in all its bearings, see Montgomery, Land Tenure in Ireland, chapter ix.

[3] Report on the Landlord and Tenant Question in Ireland, by W. Neilson Hancock, LL.D. Parliamentary Papers, 1868-69, vol. xxvi.

[4] Reports of Committees, 1865, vol. xi.

Lengthy explanations as to why the land acts had failed were abundant. The complicated machinery of their operation had to bear most of the blame. The period of renewed discussion that now began was to result in legislation based on new principles rather than improved machinery.

III. *Legislation recognizing the Possessory Right of the Tenant.*

In 1865 came the first official announcement that a great conspiracy existed among Irishmen to secure the independence of their fatherland. While British dominion in Ireland was never in any real danger from this conspiracy, the very extensive membership of the Fenian organization was an effective stimulus to the consideration of Irish grievances. From 1865 to 1868 Ireland grew steadily in prominence as a subject of political debate, and in the last of these years practically excluded every other topic.[1] The Irish members in Parliament pointed out as leading grievances the position of the established church and the relations of landlord and tenant.[2] Mr. Gladstone, then just ripe for party leadership, with the politician's instinct took up the church question first, and by means of it scored his first decisive victory over Disraeli in 1868. With the disestablishment of the Irish church in the following year, the way was cleared for the settlement of the land question under the same leadership.

In the interval between 1865 and 1869 propositions relating to this question had been a regular feature of every session of Parliament. Mr. Chichester Fortescue, chief secretary for Ireland in Earl Russell's ministry, brought in a bill designed to infuse some vitality into the act of 1860. So far as the tenant's compensation for improvements was concerned, this proposition went back to the old idea of a government official to determine the amount, which was to be paid, however, as a lump sum and not as an annuity, and which was to be estimated by the increase in the letting value due to the improvement.[3] In the following

[1] Annual Register, 1868, p. 44.

[2] See Maguire, in the debate on the Address, Ann. Reg. 1866, p. 17.

[3] Ann. Reg. 1866, p. 43. For the bill, see Parliamentary Papers, 1866, vol. v, Tenure and Improvement of Land (Ireland).

year, Lord Naas, on behalf of the Derby cabinet, introduced a proposition seeking to stimulate tenants' interest by providing for advances of money by the government for specified kinds of improvement. Certain of the works named were made independent of the landlord's consent, on the ground that they could not possibly damage the owner's interest.[1]

But these government measures, like a number of private members' bills, were all overwhelmed in the confusion of ministerial changes due to the questions of Parliamentary reform and Irish church disestablishment. The efforts to revamp and make useful the old principles lost their interest before the manifest purpose of Mr. Gladstone, in his now well-defined rôle of advanced Liberal and friend of Ireland, to undertake a solution of the land question on lines that should give at least as much play to tenants' interests as to landlords' rights.

On the 15th of February the bill was introduced which after long discussion became the Landlord and Tenant (Ireland) Act of 1870.[2] With this piece of legislation the new era in the land question was definitely opened. Mr. Gladstone announced that the demands for justice to the tenants were by this law to be fully satisfied, and the vexatious matter was to be finally settled. Nothing could be more perfectly characteristic of the usual relation between the government's acts and Irish demands than the fact that the present bill bore a close resemblance to that framed by the Tenant League in 1852.[3] In other words, the government had reached the point where Irish agitation had been eighteen years before. It was going to take eleven years to reach the point where the Irish leaders now stood. British concession had got as far as the Ulster tenant right;[4] Irish demand was far away at "the three F's."[5]

For our purpose it may be well to consider first the solution

[1] Levelling of old fences, the making of new fences and roads and the erection of buildings. Ann. Reg. 1867, p. 141 *et seq.*

[2] 33 and 34 Vict. c. 46.

[3] Chichester Fortescue, Hansard, 3d series, vol. cxcix, p. 1433. For the bill of 1852, introduced by Sergeant Shee, see Bills Public, 1852–53, vol. vii.

[4] Hansard, vol. cxçix, p. 1443.

[5] Free sale, Fixed tenure, Fair rents.

given to the question of compensation for improvements — the leading question of the preceding period. Here the act was entirely adequate. With a number of equitable qualifications, the incumbent of any tenancy less than a leasehold for thirty-one years was given a claim, at the termination of his tenancy, for compensation for improvements made by himself or his predecessors in title.[1] For holdings of not more than fifty pounds annual value, any contract depriving the tenant of this claim was made void, and in general the presumption of the law was declared to be that all improvements were the work of the tenant.[2] The determination of the amount due, with all considerations of limitations and set-off, was left to the courts.

In these provisions the whole case of the Irish tenant on the subject of improvements was gained. The ancient sensitiveness for the rights of property, which had so elaborately safeguarded the landlord's interest in the management of each holding, had lost its influence. Especial emphasis had been given to the tenants' grievances by a realization of the effect of the Incumbered Estates Act. In sales under this law the improvements on the land, by whomsoever effected, had constituted an element in enhancing the price, and consequently had been made by the purchaser the basis for increased rent. The tenant, in short, had seen his improvements confiscated and sold before his face, and had then been called upon for higher rent to pay for them.[3] Facts of this sort gave great support to the claim of protection for investments of tenant's capital, and in the movement in this direction all the old obstacles set up by the landlords were swept away. The provisions of the act were made to apply to past [4] as well as to future improvements, and this clause, which had once seemed rank communism, excited almost no controversy whatever.

[1] Sec. 4.

[2] Sec. 5. This was known as "the O'Connell clause," having been devised by the great agitator. Chichester Fortescue, Hansard, vol. cxcix, p. 1445. On the insistence of the Lords, a section was inserted permitting a landlord to file with the court a schedule of improvements made by himself, and thus to counteract the presumption otherwise binding. See sec. 6.

[3] *Cf.* Gladstone, Hansard, vol. cxcix, p. 344.

[4] Provided they had been made within twenty years.

But if compensation for improvements was conceded with little objection, it was mainly because the conservative elements found themselves hard beset by the other propositions of the bill. Now for the first time a government took up for action that "want of tenure" which from the days of the Devon Commission had been a recognized source of trouble in Ireland.[1] The popular leaders in Ireland had, by this time, gone beyond the Ulster tenant right, and were demanding for occupiers fixed tenure at fair rents, to be valued by government officials.[2] Mr. Gladstone definitely rejected *perpetuity* of tenure — declared himself unwilling to make landlords mere rent-chargers on their own estates.[3] But *security* of tenure he deemed a prime desideratum, and he shaped his course toward that end by all the side paths that seemed to lead in that general direction. He took up the Ulster tenant right, which the Devon Commission had found too radical and the Irish leaders too moderate for successful use. He encouraged long leases. He adopted the idea of compensation for arbitrary eviction. He incorporated in his bill, but with much skepticism as to results,[4] Mr. Bright's favorite scheme of governmental aid to the establishment of a peasant proprietary. The so-called "Bright Clauses" will be considered further on. Here it is important only to notice the parts of the bill dealing with tenant right and compensation for disturbance.

The general plan of the act for making tenure more secure was as follows: (1) For Ulster, the tenant-right custom was declared to be legal, and was made enforceable by the courts in case of any holding where it was proved to exist; (2) outside of Ulster any usage essentially like the Ulster custom was in like manner declared to be legally enforceable; (3) any tenant of a holding not falling under either of the former provisions, who should be "disturbed in his holding by the act of the landlord," was declared entitled to compensation for the loss sustained in quitting his holding — the amount to be determined by the court subject to the limitations of a scale embodied in

[1] See *supra*, p. 59.
[2] See Hansard, vol. cxcix, p. 1748 *et seq.*
[3] *Ibid.* p. 351.
[4] *Ibid.* p. 361.

the act. The common element in these three clauses was that in case of arbitrary eviction the ejected tenant was assured of a sum of money which bore no necessary relation to any investment he had made in improvements on his holding.[1] Under the Ulster custom it was indeed understood that the sum paid included compensation for improvements.[2] But instances were not unknown in which the payment exceeded not only the value of improvements, but the value of the fee simple of the holding.[3] Under the compensation for disturbance clause, there was a deliberate exclusion of any consideration of improvements, which were treated in another section. While the tenant thus, at the determination of his tenancy, was legally entitled to a cash payment, the landlord, under the same circumstances, was subjected to a legal mulct. In the compensation for disturbance this pecuniary burden was direct and immediate. In case of the Ulster right the loss was indirect and more or less remote, manifesting itself through the inevitable influence of the custom on rent; for the payment came from the incoming tenant, and diminished by so much his rent-paying ability.

In dealing with the Ulster custom as it did the government very cleverly avoided the baldest attack on the landlords' property rights. The demand of the Irish agitators had been that the custom should be made the law for all Ireland; in other words, that by direct enactment a part of the landlord's interest in every holding in the land should be transferred to the tenant. But the act was limited to those estates in which this transfer had already been effected by custom; and to give legal sanction to such a custom was relatively an unimportant matter. It was easily conceded that the usage could not be abolished where it

[1] A distinction to be noted is that a voluntary relinquishment of the holding brought compensation only under the special customs, and not by the general law. Whether security against eviction while the rent was paid was an incident of the Ulster custom, had been a much disputed point. The practical solution had been that when a landlord wished to resume a holding, he bought up the tenant right.

[2] The Solicitor-General for Ireland, Hansard, vol. cc, p. 1022.

[3] On a farm rented at £25 the tenant right sold for £800; on another renting at £7 10*s*. the tenant right brought £160. Hansard, vol. cc, pp. 785, 786. Twenty years' purchase of the rent would often cover the fee simple.

existed. But by many it was regarded as a serious evil. Tenant right was in fact a most vague and indefinite concept[1] and varied so much from estate to estate in all its incidents that no attempt was made to define it in the law. But besides this vagueness there was a large body of belief among those who had watched its workings that the custom was from the economic standpoint inherently vicious, and during the discussion a number of amendments were offered looking to its extinction.[2] The main charge was that the outlay for the tenant right absorbed so much of the tenant's capital as to render proper cultivation of the farm impossible.[3] There were some landlords who had expended large sums in buying up the tenant rights on their estates, believing the extinction of the right worth the outlay.[4] In justice to these a clause was inserted providing that when the landlord had bought up the tenant right of a holding, the custom should no longer be deemed to exist there.

Compensation for disturbance, also, in the first draft of the bill was so arranged as to disguise the creation of a tenant proprietary interest in the holding. No distinct provision was presented touching payment for improvements. The compensation which the tenant could claim at eviction might thus be regarded as the equivalent of his outlay on the holding, and the stickler for the just rights of property had nothing harder to swallow than the presumption — rather violent, perhaps, from the landlord's point of view — that every occupier whom the owner of an estate wished to get rid of had an actual pecuniary interest in unexhausted improvements. But this refuge for the sensitive was destroyed by the government's amendment, introduced in committee,[5] creating a special section to deal with improvements and leaving the compensation for disturbance

[1] See Dr. Ball, in Hansard, vol. cxcix, p. 1454 *et seq.*

[2] *Cf.* Hansard, vol. cc, p. 743; vol. ccii, pp. 649 *et seq.*

[3] The right was thus described by the president of the Royal Agricultural Society: "An ingenious device which takes from the landlord without giving to the tenant; and while ostensibly conferring a benefit on the cultivator of the land, really robs him of his capital so long as he has any land to cultivate." *Cf.* Hansard, vol. cc, p. 755.

[4] Lord Dufferin was one of these. He always ranked as a "good landlord." *Cf.* Hansard, vol. cxcix, p. 1506.

[5] Hansard, vol. cc, p. 1078.

with no possible justification save the damage due to cessation of the tenancy. The mere exercise by the landlord of his legal right to resume possession of his property subjected him to a legal claim by the former tenant for a sum varying from seven to one year's rent, according as the annual ratable value of the holding varied from £10 and under to £100 and over. And this too, even in case the resumption of the holding was at the expiration of a lease, provided the term had been less than thirty-one years. It was difficult not to see in these provisions the recognition of a right in the tenant to continued occupation, and a corresponding diminution of the landlord's interest. But the government did not yet by any means defend their proposition on the ground of a direct proprietary interest of the tenant. The chancellor of the exchequer explained that since improvements were definite matters of fact, while "disturbance" was indefinite, a separation of the two items, with a maximum limit to compensation for the latter, was necessary to protect the landlord from excessive mulcting.[1] Mr. Gladstone, still clinging to the "improvement" idea, explained that the distinct compensation for disturbance was designed to cover works on small holdings, such as cabins, fences, *etc.*, which meant labor and expense to the poor tenant, but which could never be proved in court to be improvements from the landlord's point of view.[2] And the inclusion of leaseholds in the provision was merely to prevent evasion of its requirements; for what landlord would subject himself to the claim for compensation if a two-years' lease would enable him to escape it?[3]

But if the act of 1870 abandoned the protection of the landlords' absolute property rights, it gave by no means a perfect protection to the newly created tenant interest. It discouraged eviction, but it did not make it impossible. The government steadfastly refused to consider any proposition looking to interference with the landlord's right to demand what rent he pleased; and non-payment of rent debarred the tenant from

[1] Mr. Lowe, Hansard, vol. cc, p. 1194.
[2] Hansard, vol. cc, pp. 1444 *et seq.*
[3] *Ibid.* pp. 1533 *et seq.*

claiming compensation at eviction.[1] Under the Ulster custom it was open to the landlord to extinguish the tenant right by forcing the rent up to such a point that no one could afford to bid for the occupancy. The tenant on such an estate, however, was given by the act the option of claiming under the general compensation clause. But here there was nothing whatever to prevent the raising of rent to such a point as to make non-payment a certainty, and hence to secure to the landlord the absolute control over the holding. In a country where competition for land was less fierce than in Ireland, the bill would have promised much for security of tenure. But for that country the prospect was not reassuring; and it was pointed out that the arrangement by which the rate of compensation was largest for the smallest holdings would inevitably create a tendency toward consolidation of farms[2] — that most fatal of facts for the peace of Ireland.

In the overwhelming importance of the compensation idea in this act of 1870, little attention was attracted to the minor features of the scheme. We may notice, however, that the earlier propositions for effecting improvements in the general situation of Ireland were still in the minds of the framers. The efficacy of long leases is still recognized in the provisions exempting leaseholds of thirty-one years and over from the compensation clauses of the act; and the evils due to limited ownership are assailed in the section (28) extending the power of limited owners to grant leases. Excessive subdivision of farms finds discouragement in the denial of compensation to tenants who subdivide or who let holdings in conacre. And finally, the question of the condition of the agricultural laborers, after giving rise to lively controversy, resulted in permission to the landlord to take into his own hands, without incurring a claim for compensation, sufficient land for the construction of decent cottages for the laborers necessary to the work on his estate.

[1] In case of existing tenancies the court was authorized by section 9 to consider a claim for compensation in case of ejectment for non-payment of rent, when the rent was under £15 per annum and the court believed it to be exorbitant. For the special reasons for this judicial valuation of rents, see Hansard, vol. cci, p. 400 *et seq.*, esp. Gladstone, p. 404.

[2] *Cf.* Montgomery, *op. cit.*, p. 147.

Such in general outline was Mr. Gladstone's first great land act. That it effected an enormous revolution in the relations of landowners and their tenants, was obvious. That the new relations would insure tranquillity to Ireland, was not so clear. The landlord class fretted under the restrictions imposed upon their property rights after a decade of the most complete freedom. The "good landlords," who were universally admitted to be a great majority of the class in Ireland, were insensibly led to substitute a more strictly legal system for the old patriarchal régime on their estates, and the "bad landlords" found evasion of the law a matter of no great difficulty. The tenants, on the other hand, keenly appreciated at first the credit which their claim to compensation gave them, but soon realized that their tenure was little more secure than before. The farm from which the occupier could assure himself of some sort of a living might be taken from him, and a sum of money, with the proper use of which he was wholly unfamiliar, given to him instead. Moreover, rents tended steadily to rise; for the risk of a claim for compensation could not be carried by the landlord gratuitously.

It was through the Home Rule Association, organized in Dublin while the land bill was before Parliament, that the dissatisfaction with Mr. Gladstone's Irish measures found formal expression. But while the landlord interest was largely concerned in the formation of the Home Rule party, the policy of the party, under the leadership of Mr. Butt, soon took the direction of more radical concessions to the tenants. The "three F's" became the burden of the Home Rulers' demand, and many bills in this sense were brought up in Parliament[1] between 1870 and 1880, but no government gave them support. It was not till the rise of Mr. Parnell to prominence and leadership, and the thorough democratization of the Home Rule party, that the government was forced to acknowledge that the Irish land settlement could not be left as final.

WM. A. DUNNING.

[1] Mr. Butt's bill in 1876 provided for perpetuity of tenure, with a periodical revision of rents on the basis of agricultural prices. Parliamentary Papers, 1876, vol. iii.